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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARK R. BOLADO, Lance Corporal,
United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution's Appointments Clause preclude Congress from granting the Judge Advocate General of the Navy the power to appoint the judges of the Navy-Marine Corps Court of Military Review?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Mark R. Bolado, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals rendered in this proceeding on April 2, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Bolado*, —— M.J. ——, No. 67657, (C.M.A. April 2, 1992), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on April 2, 1992. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION, STATUTE, AND MEMORANDUM INVOLVED

The pertinent portion of Art. II, § 2 is set forth in Appendix C. The text of 10 U.S.C. § 866 is set forth in Appendix D. The text of Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992), is set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner was charged with one count of attempted distribution of LSD and one count of attempted use of LSD in violation of 10 U.S.C. § 880, and two counts of use of LSD in violation of 10 U.S.C. § 912a. Finding that the government had violated petitioner's speedy trial rights, the trial judge dismissed the attempted distribution charge and both counts of use.

Pursuant to 10 U.S.C. § 862, the government took an interlocutory appeal to the Navy-Marine Corps Court of Military Review, which reversed the trial judge's order. *United States v. Bolado*, 34 M.J. 732 (N.M.C.M.R. 1991) Petitioner then asked the Court of Military Appeals to review the Navy-Marine Corps Court's ruling. The Court of Military Appeals granted the petition for review and summarily affirmed the Navy-Marine Corps

Court's decision. *United States v. Bolado*, —— M.J. ——, No. 67657 (C.M.A. April 2, 1992).

REASON FOR GRANTING THE WRIT

CONGRESS' PLACEMENT OF THE POWER TO APPOINT MEMBERS OF THE COURT OF MILITARY REVIEW IN THE JUDGE ADVOCATE GENERAL IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION.

Because of their jurisdictional limits, *see* 10 U.S.C. § 866(b), the Courts of Military Review hear appeals in only the most serious military criminal cases. In fiscal year 1990, the four Courts of Military Review resolved a total of 5,730 cases. *Annual Report of the Code Committee on Military Justice*, 32 M.J. CXIII, CLXI, CLXXV, CLXXVII, CXCVII (1990). If past trends continue, the Court of Military Appeals will review the merits of fewer than 200 of these cases. *See id.* at CXXXVI. Thus, in the vast majority of cases, the Court of Military Review is the only appellate court which will ever examine a servicemember's court-martial conviction.

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. art. II, § 2, cl. 2. Congress can devolve appointment authority upon no other official. *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that Court of Military Review judges, who exercise extraordinary authority and discretion,[1] are Officers

[1] For example, a capital appellant *cannot be executed* unless the Court of Military Review determines that the death sentence is appropriate and proportional for the appellant's crimes and as compared to sentences "imposed by other jurisdictions in similar situations." *United States v. Curtis*, 33 M.J. 101, 109 (C.M.A. 1991), *cert. denied*, 112 S. Ct. 1177 (1992); *see also* 10 U.S.C. § 866(c) (providing that a Court of Military Review may affirm "only such

of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Yet Congress vested the power to appoint Court of Military Review judges in the Judge Advocates General. 10 U.S.C. § 866(a). Placing the power to appoint Article I court judges in such a low-level official [2] raises a serious question under the Appointments Clause.

This question is important not only because of Court of Military Review judges' critical role, but also because of the importance of the Appointments Clause itself. The Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. This concern is directly implicated by allowing the Judge Advocate General to appoint Court of Military Review judges. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

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findings of guilty and the sentence or such part or amount of the sentence as it finds correct in law and fact and determines, on the basis of the entire record, should be approved").

[2] The Judge Advocates General are not even the primary legal advisors in their respective services. Rather, "The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense." Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992) [Appendix E].

Freytag, 111 S. Ct. at 2639 (emphasis added). The quality of the Court of Military Review, and the military justice system as a whole, would be enhanced if an official less parochial than the Judge Advocate General appointed the intermediate appellate court's judges.

Appointment by a higher-level official is precisely the process envisioned by the Appointments Clause. As in *Freytag*, "[i]t is beyond question . . . that Congress did not intend to grant to the President the power" to appoint Court of Military Review judges. 111 S. Ct. at 2642. Nor is the Judge Advocate General of the Navy, who is a subordinate of the Secretary of the Navy, *see* 10 U.S.C.A. § 5148 (West Supp. 1991), a Head of a Department. It is self-evident that the Judge Advocate General of the Navy, who is by statute an Executive Branch officer tasked with performing legal duties "under the direction of the Secretary of the Navy," *id.* at § 5148(b), (d), is not a "Court of Law." Thus, Congress placed the power to appoint Court of Military Review judges in an impermissible official.

The appointment of Court of Military Review judges in violation of the Appointments Clause is a serious constitutional defect which the Court should address immediately. The *Freytag* Court indicated that "[t]he alleged defect in the appointment of the special trial judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." 111 S. Ct. at 2639. This comports with the Court's earlier recognition that individuals appointed in violation of the Appointments Clause may not be involved in "the administration and enforcement of the public law[.]" *Buckley*, 424 U.S. at 139. Thus, until Congress enacts a constitutional appointment scheme, every action of the Courts of Military Review is invalid.

Finally, despite the fact that this issue was not raised below, this Court should not treat it as waived or forfeited. *See Freytag*, 111 S. Ct. at 2647 n.2 (Scalia, J., concurring). As noted in *Freytag*, the Court "has exer-

cised its discretion to consider nonjurisdictional claims that have not been raised below." 111 S. Ct. at 2639 (citing, *inter alia*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962)). The Court emphasized, "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag*, 111 S. Ct. at 2639. Due to the importance of this issue to the entire military justice system and to the rule of constitutional law, the Court should hear the Appointments Clause issue.

CONCLUSION

The manner in which Court of Military Review judges are appointed presents a serious constitutional issue: may Congress vest the power to appoint the judges of an Article I court in an official who is statutorily subordinate to the Secretary of a Department? This issue strikes at the heart of the military justice system's structural integrity. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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June 30, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 67657/MC
CMR Dkt. No. 91-2682

UNITED STATES,

Appellee

v.

MARC R. BOLADO (221-64-5448),

Appellant

ORDER

On consideration of appellant's petition for grant of review of the United States Navy-Marine Corps Court of Military Review decision on appeal by the United States under Article 62, Uniform Code of Military Justice, 10 USC § 862, it is, by the Court, this 2nd day of April, 1992,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM No. 91-2682-M

UNITED STATES,

Appellee,

v.

MARC R. BOLADO, 221-64-5448 Lance Corporal (E-3), U.S. Marine Corps,

Appellant.

Dec. 19, 1991

Capt Dwight H. Sullivan, USMC, Appellate Defense Counsel.

LT David P. Sheldon, JAGC, USNR, Appellate Defense Counsel.

Maj Laura L. Scudder, USMC, Appellate Government Counsel.

LAWRENCE, Judge:

This case comes to us by Government appeal filed pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862. At trial, the military judge dismissed certain charges and specifications based on a denial of appellant's speedy trial rights contained in Rule for Courts-Martial (R.C.M.) 707, Manual for Courts-Martial (MCM), United States, 1984.

TIMELINESS OF APPEAL

Article 62, UCMJ, requires that Government appeals from trial court rulings be "diligently prosecuted" and that an appeal "shall be forwarded by a means prescribed under regulations of the President directly to the Court of Military Review." R.C.M. 908(b)(6) states that "trial counsel shall promptly and by expeditious means forward the appeal to a representative of the Government designated by the Judge Advocate General." Rule 21(d)(1), Courts of Military Review Rules of Practice and Procedure [hereinafter Court Rules] provides in pertinent part:

> The trial counsel shall have 20 days from the date written notice to appeal is filed with the trial court to forward the appeal, including an original and three copies of the record of trial, to the representative of the Government designated by The Judge Advocate General. The person designated by The Judge Advocate General shall promptly file the original record with the Clerk of the Court of Military Review and forward one copy to opposing counsel.

The first issue in resolving this appeal is whether mailing the appeal and record of trial within 20 days from the date of written notice of appeal to the trial court meets the requirements of the cited authorities.

We find that it does. R.C.M. 908(b)(6) and Court Rule 21(d)(1) are promulgated pursuant to express statutory authority in Articles 36, 62, and 66, UCMJ, 10 U.S.C. §§ 836, 862, and 866; consequently, if possible they will be interpreted to avoid any conflict in their terms. The President in R.C.M. 908 chose to promulgate a general rule that trial counsel will forward government appeals promptly and by expeditious means. Article 66(f), UCMJ, requires the Judge Advocates General to "prescribe uniform rules of procedure for Courts of Military Review." Clearly, Congress intended to grant to those officers discretion to exercise their independent judgment

in fashioning those rules so long as the resulting rules do not conflict with the Code or any provision properly promulgated pursuant to Codal authority. The Judge Advocates General chose a simple, definite rule that can be followed readily in every case and elected not to distinguish between cases being tried overseas and those tried in the United States. We conclude that they acted within their statutory grant of authority in promulgating the Court Rule and that the Court Rule does not conflict with the Rule for Courts-Martial. Thus, except in the most extraordinary case[1] compliance with the Court Rule constitutes compliance with the Rule for Courts-Martial.

The Court Rule only requires that the appeal be forwarded within the 20-day period, not received or filed. The word "forward" means "[t]o send forward; to send toward the place of destination; to transmit." *Black's Law Dictionary* 590 (5th ed. 1979). Furthermore, a strict requirement that an appeal be received by the Government representative within 20 days of notice of appeal would be an unduly onerous burden on the Government in light of the world-wide locations of courts-martial. Court Rule 21(d)(1) requires that the appeal be forwarded along with the original and two copies of the record of trial. That record must be typed and edited prior to forwarding. An expedited preparation reasonably may take several days even if only a portion of the trial proceedings are transcribed. To require receipt by the Government representative within 20 days would in essence require hand-carry by a courier from overseas locations since virtually any other means would risk a delay sufficient to result in a late receipt and, according to appellee, a dismissal of the appeal. We will not impose a requirement the Judge Advocates General declined to

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[1] We do not decide whether the *means* of forwarding the appeal may be so patently unreasonable and unexpeditious under the circumstances as to amount to a violation of Article 62 and R.C.M. 908 since the facts of this case do not present the issue.

include in the exercise of their statutory authority under Article 66.

Appellee cites two decisions that allegedly support his interpretation of Court Rule 21(d)(1). We conclude that neither does. In *United States v. Snyder*, 30 M.J. 662 (A.F.C.M.R.1990), the Court issued an order to the Government to show cause why its appeal should not be denied for a " 'failure to promptly *file the Record of Trial with the Clerk of this Court* as required by Rule 21.' " *Id.* at 664 (emphasis added). The Court found that the Government had not met its burden of showing that the filing was prompt since 30 days elapsed from the date of notice of appeal to the filing of the record of trial with the clerk of court. Because the Government failed to indicate when the record of trial was received by the Government representative, there existed the possibility that numerous days had passed between receipt by the representative and filing with the clerk of court. Appellee also cites our unpublished decision of *United States v. Odom*, No. 88-2562 M (N.M.C.M.R. Aug. 8, 1988). Because the decision is unpublished, it is not legal precedent that binds this Court. In *Odom*, the appeal and original record of trial were not forwarded within 20 days after notice of appeal, and they sat for several days in the administrative section of the appellate review activity prior to being obtained by the Government representative and being filed with the clerk of court. We agree that persuasive grounds existed for denying the appeal on the basis of untimeliness, however, we must conclude that dicta in the decision suggests a misreading of the Court Rule by the Court. We disavow any suggestion in *Odom* that the appeal and record of trial must be *received* by the Government representative within 20 days of notice of appeal.

We conclude that the Government appeal was forwarded and filed in accordance with Court Rule 21(d)(1) and is therefore timely.

MERITS OF THE APPEAL

Turning now to the merits of the appeal, we begin by acknowledging that we may "act only with respect to matters of law," Article 62(b), UCMJ, 10 U.S.C. § 862 (b), and we are bound by the military judge's determination of fact unless it is " 'unsupported by the evidence of record or was clearly erroneous.' " *United States v. Burris*, 21 M.J. 140, 143-44 (C.M.A.1985), citing *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A.1981). We conclude that the military judge erred as a matter of law and grant the Government appeal.

The offenses alleged in this case involve attempted distribution and wrongful use of Lysergic Acid Diethylamide (LSD) allegedly occurring during November 1989 to February 1990. The appellee was a member of a helicopter squadron at the time of the alleged offenses and remained a member of that squadron until 28 August 1990 when the unit deployed to Southwest Asia as part of Operation Desert Shield. On that date, he was reassigned to another helicopter squadron that did not deploy. The appellee was a metalsmith who had worked directly on squadron aircraft, but after his transfer he was assigned to the toolroom because of a squadron policy that no one involved in a drug incident was permitted to work directly on squadron aircraft. No other form of restraint or loss of liberties was placed upon him. It was stipulated by the parties that appellee's test scores throughout this period made him ineligible for advancement to corporal.

In September 1990, the squadron commander decided to order the investigation of the charges pursuant to Article 32, UCMJ, and charges were preferred. Shortly after the appointment of an investigating officer in mid-October 1990, the squadron legal officer learned that two military members who were Naval Investigative Service (NIS) witnesses had been deployed to Southwest Asia as part of Operation Desert Shield with no known date of return. The legal officer thereafter informed the squadron com-

mander that the case could not be prosecuted successfully without the two witnesses and that failure to dismiss or try the case within 120 days from the date of preferral of charges would result in a dismissal based on a denial of speedy trial. In response to this advice, on 30 October 1990, the squadron commander ordered the trial counsel to line out the original charges. Trial counsel did so and dated each interlineation. On 2 November 1990, the commander executed a document entitled "Dismissal of Charges" in which it states that the charges forwarded for investigation were thereby dismissed. The appellee was informed verbally of the dismissal but that the charges would be reinstituted at some time in the future. Thereafter, appellee was not confined or restricted nor was he placed on legal hold, and he requested and was granted annual leave over the 1990 Christmas holidays.

In March and April 1991, the NIS witnesses returned from Operation Desert Shield Storm. In June, the squadron commander initiated action to reinstitute Article 32 investigation proceedings, and charges were preferred again in late June. Appellee was again granted annual leave. An investigating officer was appointed in mid-July, and an additional charge was preferred to be investigated with the original charges. Finally, in mid-August, the charges were referred for trial by special court-martial. At that trial on 24 September 1991, at which appellee was arraigned,[2] the military judge dismissed the original charges with prejudice based on his finding of a denial of appellee's right to speedy trial of those charges.

The military judge entered essential findings of fact and conclusions of law. In pertinent part he found that the Government had undertaken "no efforts to depose the witnesses overseas or to arrange for their presence at the

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[2] Because arraignment was completed after 6 July 1991, the changes to R.C.M. 707 contained in Exec.Order No. 12767, 56 Fed. Reg. 30, 284 (1991), were in effect at the time of the military judge's ruling in this case.

investigation." He found that although the squadron commander "styled his memorandum as a dismissal of charges, it is apparent that his intent was merely to withdraw the charges from the investigation until such time as the government witnesses returned to the situs of the investigation and were available to testify." He noted that the unavailability of the witnesses had not been established on the record and that the purported dismissal apparently had been directed "as a matter of convenience to the government." Lastly, he emphasized the lack of evidence establishing the two witnesses' unavailability, the impracticability of ordering them to return to testify, or the impracticability of taking their depositions for use in the investigation. He concluded by stating:

> . . . While the affected charges and specifications are comparatively serious, the impact of reprosecution of the accused, on these charges appears counter-productive to the goal of prompt administration of military justice. Additionally, while the accused has not been incarcerated or otherwise restrained during the intervening period of delay, he has been sidelined from his MOS as a metalsmith for approximately a year's time and left in a backwater of suspicion. Balancing these considerations as a whole against the background of the government's obligation to ensure the accused receives a speedy trial, the weight of the factors, tips in favor of the accused.

Based on these reasons, the original charges were dismissed with prejudice. After hearing these findings and the ruling, trial counsel made an offer of proof of testimony that would establish that had any request for these two witnesses been made it would have been properly denied based on their unavailability. He proffered that during Operation Desert Shield/Storm they were both military policemen serving in a unit that was severely undermanned and overworked already. The military

judge indicated that that evidence would not change his ruling and declined to hear it.

This case does not involve the right to speedy trial contained in the Sixth Amendment to the United States Constitution, nor does it pertain to the principles set forth in *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), and its progeny since at no time was appellee confined or otherwise restrained in his liberty prior to trial.[3] For these reasons, appellee's speedy trial rights are encompassed in R.C.M. 707. R.C.M. 707(b)(3)(A) provides that "[i]f charges are dismissed . . . a new 120-day time period under this rule shall begin on the earlier of (i) the date of repreferral; (ii) the date of imposition of restraint under R.C.M. 304(a)(2)-(4)." As noted previously, at no time during the pretrial proceedings in this case was appellee subjected to pretrial restraint under R.C.M. 304(a)(2)-(4). Accordingly, it is clear that if the squadron commander dismissed the charges as he indicated he did, the 120-day speedy trial clock began anew on the date of re-preferral.

Dismissal occurs when action is taken by a commander that terminates the charges. Charges may be dismissed prior to or after referral to a court-martial. R.C.M. 306(c)(1), 401(c). After dismissal, the accused "no longer faces charges" and returns "to full-time duty with full rights as accorded to all other servicemembers." *United States v. Britton*, 26 M.J. 24, 26 (C.M.A.1988). After dismissal, "[r]einstitution of charges requires the command to start over. The charges must be re-preferred, investigated, and referred in accordanance with the Rules for Courts-Martial, as though there were no previous charges or proceedings." *Id.* R.C.M. 401(c)(1), Discussion, indicates that "[c]harges are ordinarily dismissed by lining out and initialing the deleted specifications or

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[3] We presume that R.C.M. 707 accords with Article 10, UCMJ, 10 U.S.C. § 810, which pertains to speedy disposition of charges when the accused is in arrest or confinement.

otherwise recording that a specification is dismissed. When all charges and specifications are dismissed, the accuser and the accused ordinarily should be informed." The Discussion to the Rule further states that "[a] charge should be dismissed when it . . . is unsupported by available evidence, or when there are other sound reasons why trial by court-martial is not appropriate." If a charge is dismissed, the statute of limitations is no longer tolled on it. *United States v. Mucthison*, 28 M.J. 1113, 1115 n.3 (N.M.C.M.R.1989).

Withdrawal of charges merely takes them out of the court-martial proceedings to which they were referred. The charges are nonetheless viable and may be re-referred without re-preferral and re-investigation. The trial counsel may line out withdrawn charges or specifications and renumber the remaining charges or specifications, initialling the changes. R.C.M. 604(a), Discussion. Withdrawn charges may be re-referred to another court-martial only for a proper reason. R.C.M. 604(b). Significantly, the Discussion to R.C.M. 604(a) states that "[c]harges which are withdrawn from a court-martial should be dismissed (*see* R.C.M. 401(c)(1)) unless it is intended to refer them anew promptly or to forward them to another authority for disposition." If a charge is only withdrawn, the statute of limitations remains tolled. *Mucthison*.

Additionally, R.C.M. 604 indicates that withdrawal of charges only occurs after those charges have been referred to a court-martial. Thus both sections (a) and (b) speak of withdrawal "from a court-martial," and the Discussion and Analysis of the Rule discuss withdrawal from a court-martial there is no entity from which to withdraw these charges. Charges can only be withdrawn from a proceeding to which they have been formally referred.

Applying the facts to the law, it is clear that the original charges were dismissed by the actions taken on 30 October and 2 November 1990. The charges had not been referred to trial by court-martial at that time, and thus the commander's action was not a withdrawal of charges

within the meaning of that term as it is used in military law. The charges were lined out, and a document was executed that stated that the charges were dismissed. Appellee was informed verbally of the dismissal. This action took place in late-October, early-November 1990 at a time when Operation Desert Shield was ongoing and rapidly expanding when no squadron commander could predict when the operation might cease and the witnesses could return to the United States. Clearly, the squadron commander did not then intend to refer them anew promptly, and we find it highly unlikely that he would have considered for a moment forwarding them to another authority in Southwest Asia for trial given the obvious military and logistical exigencies of the time. Appellee was under no form of restraint and was returned to regular military duties. He asked for and was granted annual leave. When the two absent witnesses became available, the charges were re-preferred and investigated anew. We cannot imagine what more could establish a dismissal of charges vice a withdrawal.

This Court in *United States v. Lorenc*, 30 M.J. 619 (N.M.C.M.R.1990), noted that the Court in *Britton* deduced the intent of the convening authority "as evidenced by the actions he took." *Lorenc* at 622. Certainly, the actions taken by the squadron commander in this case convincingly prove that he intended to dismiss the original charges. The military judge seemingly found that the commander intended merely to withdraw the charges because he intended to reinstitute them when the two witnesses became available. R.C.M. 707(b)(3)(A) and *Britton* make clear that an intent to reinstitute charges does not mean that an otherwise clear dismissal of charges is to be treated as a withdrawal under R.C.M. 707. In no way is the intent to reinstitute charges at a later date inconsistent with an intent to dismiss them presently.[4]

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[4] We note that the Air Force Court of Military Review seemingly has come to a different conclusion. In *United States v. Mickla*, 29

In rendering his findings of fact and conclusions of law, the military judge emphasized the lack of evidence establishing the witnesses' unavailability and the impracticability of returning them to the situs of the investigation or securing their depositions. Accepting the military judge's finding that no such evidence was introduced, we find this consideration to be entirely irrelevant. Under R.C.M. 707, the squadron commander could consider those factors if he chose in deciding whether to dismiss the charges, however, the commander was not limited to those considerations and could consider any relevant factor. If a commander decides to dismiss the charges and action is taken that does so, nothing in the Rule permits a trial judge to substitute his judgment for that of the commander regarding the relative merits of the dismissal. The Government hears no burden under the Rules for Courts-Martial to show a proper basis for dismissal of charges. The re-referral of withdrawn charges permits an accused to challenge the withdrawal on the basis that it was for an improper reason, *see R.C.M.* 604(b); we can find no similar basis for challenging a dismissal of charges.[5] Even if the Government bore such a burden, the trial judge could readily judicially note, as we now do that in late-October, early-November 1990, the United States Marine Corps was engaged in a massive overseas deployment to confront a potential enemy that was widely thought to have large, well-equipped, experienced, and

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M.J. 749 (A.F.C.M.R. 1989), the Court used language that suggests that if later court-martial action is contemplated, that fact implies withdrawal or an attempt to place the charges in some sort of "limbo." If this language is more than dicta, we conclude that the Court was in error. Dismissal is appropriate if no further court-martial-action against an accused is contemplated; however, if further action is contemplated after more than a brief period, dismissal is equally appropriate.

[5] We do not decide whether an otherwise valid dismissal is in essence converted to some other action if done for a proven improper reason or in bad faith and the evidences establishes prejudice to the accused.

determined military forces. Under these circumstances, a commander's decision not to attempt to have two uniformed military police personnel transported from Southwest Asia to the United States, where they might have to remain for weeks for an investigation and trial, is patently reasonable and is based on a proper reason. Furthermore, while obtaining their depositions would facilitate the pretrial investigation, *see* R.C.M. 405(g)(4)(B), counsel and the accused would have to be flown into a potential combat zone in order to secure the depositions, *see* R.C.M. 702(g)(1)(A).

As part of the reasoning behind the dismissal with prejudice, the military judge balanced the seriousness of the offenses against the general goal of the prompt administration of military justice and concluded that in light of all the facts, particularly the fact that appellee was removed from working in his MOS and was "left in a backwater of suspicion," the weight of all pertinent factors tipped in favor of dismissing the charges with prejudice. Since dismissal of the charges had occurred, no 120-day speedy trial clock under R.C.M. 707 was running until charges were re-preferred. The time from re-preferral to appellee's arraignment, an event that under R.C.M. 707(b)(1) stopped the speedy trial clock, is less than 120 days; therefore, no R.C.M. 707 violation occurred. There was no occasion for the military judge to balance the factors contained in R.C.M. 707(d) since they become relevant only upon a valid finding of a violation of the Rule.[6]

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[6] Even had a violation occurred, a commander's decision to reassign an accused to another duty assignment is not the kind of prejudice envisioned in R.C.M. 707(d). We agree fully with the Court in *United States v. Callinan*, 32 M.J. 701 (A.F.C.M.R. 1991), that an accused may be reassigned to other normal military duties as an administrative decision, based on his alleged misconduct, and nonetheless be returned to full-time military duties as that status is contemplated in *Britton* following dismissal of charges. We also note that the "backwater of suspicion" that may survive dismissal of

We therefore conclude that the military judge erred as a matter of law in dismissing these charges based on a violation of R.C.M. 707. Accordingly, the Government appeal is granted. The record of trial is returned to the Judge Advocate General for action consistent with this ruling.

Senior Judge JONES and Judge REED concur.

---

charges may be no greater than that existing prior to preferral of charges. At any rate, that minimal prejudice alone generally does not affect an accused's ability to defend at trial and is minor in light of the draconian remedy of dismissal with prejudice of serious charges based on a violation of a nonconstitutional speedy trial right.

APPENDIX C

U.S. Const. art. II, § 2

The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

APPENDIX D

10 U.S.C. § 866, Article 66, Uniform Code of Military Justice. Review by Court of Military Review

(a) Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Military Review the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Military Review may act only with respect to the findings and

sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Military Review sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Military Appeals, or the Supreme Court instruct the convening authority to take action in accordance with the decision of the Court of Military Review. If the Court of Military Review has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Military Review and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the offices of the Judge Advocates General and by Courts of Military Review.

(g) No member of a Court of Military Review shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Military Review, an effectiveness,

fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty.

(h) No member of a Court of Military Review shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

APPENDIX E

[SEAL] [SEAL]

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000

March 3, 1992

MEMORANDUM FOR:

SECRETARIES OF THE MILITARY DEPARTMENTS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services

Among the chief duties of the Secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments within the Department of Defense.

Accordingly, pursuant to Title 10, including Sections 113, 3011, 5011, and 8011, and Department of Defense Directive 5105.2, this is to direct effective immediately as follows:

(1) The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense.

(2) The General Counsels of the Military Departments shall be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services within their respective departments.

(3) Civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a Military Department shall be subject to the authority of the General Counsel of that Military Department with respect to the performance of those legal duties.

(4) The General Counsels of the Military Departments shall ensure that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the Military Departments comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsels of the Military Departments shall be the controlling legal opinions of their respective Departments.

(6) The General Counsels of the Military Departments, subject to the authority, direction and control of the Secretaries of the Military Departments, shall imple-

ment this memorandum in a manner consistent with applicable law, including Sections 806, 825, 827, 854 through 870, 873, 874, and 945 of Title 10.

Nothing in this memorandum shall be deemed to create any right in any person not otherwise prescribed by law or regulation.

s/ D.J. Atwood

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(2)

No. 92-6

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARK R. BOLADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select the judges of the courts of military review.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a, is not yet reported. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 2a-14a, is reported at 34 M.J. 732.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 2, 1992. The petition for a writ of certiorari was filed on June 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was charged with one count of attempted distribution of LSD and one count of attempted use of LSD, in violation of 10 U.S.C. 880, and two counts of use of LSD, in violation of 10 U.S.C. 912a. The trial judge dismissed the charges on the ground that petitioner's speedy trial rights had been violated. The government appealed the dismissal to the Navy-Marine Corps Court of Military Review, which reversed the trial judge's order and remanded the case for trial. The Court of Military Appeals granted petitioner's request for review and summarily affirmed the judgment of the Navy-Marine Corps Court of Military Review.

ARGUMENT

In this case, the Navy-Marine Corps Court of Military Review reversed the judgment of the trial judge and remanded the case for a court-martial. Petitioner challenges that action, arguing that the judges of the court of military review were appointed to that position by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.

First, petitioner has not properly preserved his claim. Petitioner did not raise that contention in the court of military review or in the Court of Military Appeals, and neither court addressed this claim. Petitioner therefore cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]")

(quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[1]

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Freytag* to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite their failure to assert it in the courts below. 111 S. Ct. at 2639. Although petitioner urges this Court to follow the same approach in this case, he has not explained why the question in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court. In addition, the Court of Military Appeals has recently granted discretionary

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[1] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decision in any case to less than all the issues urged by the accused. 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

review to resolve this question. See *United States* v. *Weiss*, No. 67869/MC (C.M.A. June 16, 1992). Once that court has spoken on the matter, there will be ample time to address the question presented by this petition.

Second, there is no conflict among the circuits on the question presented by the petition. Only two appellate courts have addressed the issue; both courts are intermediate appellate courts in the military justice system; and both courts rejected an Appointments Clause challenge to the composition of the courts of military review. See *United States* v. *Prive*, No. 984 (C.G.C.M.R. July 6, 1992); *United States* v. *Coffman*, No. 92-1030 (N.-M.C.M.R. June 3, 1992).

Third, petitioner's claim lacks merit. The Appointments Clause, Art. II, § 2, Cl. 2,[2] provides that only the President (with the advice and consent of the Senate) may appoint "Officers of the United States." By contrast, Congress can vest the power to appoint "inferior Officers" "in the President alone, in the Courts of Law, or in the Heads of Departments." In petitioner's view, the judges of the courts of military review are "inferior Officers," but the Judge Advocates General are neither "Courts of Law" nor "the Heads of Departments" and thus cannot appoint the judges of the courts of military review. The short answer to petitioner's argument is

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[2] The Appointments Clause, Art. II, § 2, Cl. 2, provides as follows:

> He [the President] * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

that because the members of the Navy-Marine Corps Court of Military Review that rendered the judgment challenged by petitioner were officers of the United States appointed by the President and confirmed by the Senate, an additional appointment pursuant to the Appointments Clause is unnecessary.

The courts of military review are part of a comprehensive system of military justice established by the Uniform Code of Military Justice. The Judge Advocates General of the services are primarily responsible for implementing the UCMJ.[3] In carrying out that obligation, the Judge Advocates General detail commissioned military officers to serve at almost every level of the military justice system.[4] Consistent with that scheme, Article 66(a) of the UCMJ, 10 U.S.C. 866(a), provides as follows (emphasis added):

> Each Judge Advocate General shall establish a Court of Military Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges.

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[3] The Judge Advocates General are defined as "the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, the General Counsel of the Department of Transportation." 10 U.S.C. 801(1).

[4] See, *e.g.*, 10 U.S.C. 801(13) (specifying that all "judge advocate[s]" must be military "officer[s]" serving in the various Judge Advocate General corps or other military "officer[s]" designated as "judge advocate[s]" or "law specialist[s]"), 826 (requiring the Judge Advocates General to certify and detail "commissioned officer[s] of the armed forces" to serve as military trial judges), 827(b) (specifying that prosecution and defense counsel who are, detailed to practice before courts-martial must be judge advocates, who are, by definition, commissioned military officers), 870 (providing that the Judge Advocate General shall "detail * * * commissioned officers" to serve as appellate counsel before the Courts of Military Review and the Court of Military Appeals).

> * * * Appellate military judges who are *assigned* to a Court of Military Review may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Military Review established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

Pursuant to Article 66(a), the Judge Advocate General of the Navy established the Navy-Marine Corps Court of Military Review and detailed officers to serve on that court. At all times relevant to petitioner's appeal, only commissioned officers of the Navy and Marine Corps were assigned to serve as judges on that body. See Navy Judge Advocate Personnel and Activity Directory II-6 (1991) (listing the name and rank of the judges of the N-MCMR).[5]

Each commissioned officer in the Navy and Marine Corps is appointed, at least originally, by the President, with the advice and consent of the Senate.[6] As a matter

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[5] The provision of Article 66(a) authorizing the Judge Advocates General to assign civilians to serve on courts of military review is not at issue in this case. It is undisputed that no civilian has served on the N-MCMR during the consideration of petitioner's appeal. Accordingly, the only question presented in this case is whether the Judge Advocate General of the Navy has in fact assigned judges to the N-MCMR who are constitutionally authorized to exercise the duties of that office. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 126, 141 (1976).

[6] See 10 U.S.C. 531(a) ("Original appointments [of Regular Navy and Marine Corps officers] shall be made by the President, by and with the advice and consent of the Senate."), 593 (requiring Presidential appointment and Senate confirmation of military re-

of practice, the Judge Advocate General of the Navy has assigned to the Navy-Marine Corps Court of Military Review only those commissioned officers who are in the Navy Judge Advocate General's Corps and those who are designated by the Marine Corps as "judge advocate[s]" or "law specialist[s]." Congress recognized this practice by limiting the types of officers who could be "judge advocate[s]." See Art. 1(13), UCMJ, 10 U.S.C. 801(13). Judges on the Navy-Marine Corps Court of Military Review are commissioned military officers, and thus may be assigned to nonjudicial duties by the Navy Judge Advocate General as he deems necessary to meet the needs of the service. And it is well settled that Congress may modify existing duties or specify additional germane duties to be performed by an officer of the United States without thereby making it necessary for the incumbent again to be nominated, confirmed, and appointed pursuant to the Appointments Clause. See *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893).

In *Shoemaker*, the complainants challenged a statute establishing a commission to oversee the development of Rock Creek Park. 147 U.S. at 284. Three commission members were appointed by the President with the advice and consent of the Senate, but two military officers (the Chief of Engineers of the United States Army and the Engineer Commissioner of the District of Columbia) also were designated to serve on the commission. *Ibid.* Their presence was challenged on the ground that they had not been nominated to and confirmed for their new position. The Court rejected that claim, explaining that, *id.* at 301:

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serve officers), 624 (governing promotions of regular military officers), 5912 (governing appointments and promotions of reserve officers).

> [T]he two persons whose eligibility is questioned were at the time of the passage of the act * * * officers of the United States who had been theretofore appointed by the President and confirmed by the Senate[.] [W]e do not think that, because additional duties, germane to the offices already held [were added by Congress], it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

The Court ultimately held that "the duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of, their official duties." *Ibid.*; see also *Williams* v. *Mercer*, 783 F.2d 1488, 1515 (11th Cir.) (holding that members of the Investigating Committee of the Judicial Council of the Eleventh Circuit "were not 'appointed' by the chief judge within the meaning of the Appointments Clause * * * but rather [were] sitting federal judges already appointed by the President * * * [whose] service on [the Investigating Committee was] merely an outgrowth of their existing responsibilities"; citing *Shoemaker* for the proposition that "a statutory expansion of the functions of an existing position does not create a new office requiring re-appointment"), cert. denied, 477 U.S. 904 (1986).

Under that analysis, the assignment of any Navy or Marine Corps officer to serve a tour of duty on the Navy-Marine Corps Court of Military Review is entirely consistent with the Appointments Clause. All military officers are responsible for seeing to the discipline of the men in their command and are trained to enforce the civil and military law. Under the Uniform Code of Military

Justice, commissioned officers have a special duty "to quell quarrels, frays, and disorders among persons subject to [the Code] and to apprehend persons subject to [the Code] who take part therein." Art. 7(c), UCMJ, 10 U.S.C. 807(c). Every commanding officer is further authorized to impose certain "non-judicial punishment[s]," including arrest in quarters for not more than 30 consecutive days, instead of instituting court-martial proceedings. Art. 15, UCMJ, 10 U.S.C. 815. Moreover, only Marine Corps "law specialist[s]" and members of the Navy Judge Advocate General's Corps are assigned to serve on the Navy-Marine Corps Court of Military Review. For these reasons, the duties of a judge of the Navy-Marine Corps Court of Military Review are germane to the duties of the officers assigned to serve on that court. Petitioner's challenge to the composition of the court of military review therefore lacks merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's Brief in Opposition to the Petition for Certiorari contends that two Courts of Military Review have considered the question presented by the petition. Brief in Opposition at 4 (citing *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam); *United States v Prive*, 35 M.J. 569 (C.G.C.M.R. 1992)). The Navy-Marine Corps Court of Military Review's *Coffman* decision, however, did *not* address the issue presented in the petition, which involves the method by which military appellate judges are appointed. Rather, *Coffman* con-

sidered the method by which military *trial* judges are appointed. The distinction between military trial and appellate judges is not without a difference. While military trial judges must be commissioned officers, 10 U.S.C. § 826(b) (1988), appellate judges need not be. 10 U.S.C. § 866(a) (1988). Because the *Coffman* court expressly relied upon the fact "that all military judges must be commissioned officers of the armed forces of the United States," 35 M.J. at 592, *Coffman* is inapplicable to the question presented in the petition. *See Prive*, 35 M.J. at 570 (distinguishing *Coffman* on the basis that *Prive* involved a challenge to both trial and appellate judges).

Because *Coffman* is inapposite, *Prive* is the only published case to address the issue presented.[1] *Prive*, however, is inconsistent with Supreme Court precedent. In *Prive*, the Coast Guard Court expressly held that Court of Military Review judges are officers, not mere employees, of the United States. *Prive*, 35 M.J. at 572-73. The Coast Guard Court, however, held that Congress was not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. *Id.* at 576-77. This holding is inconsistent with this Court's directive that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

Respondent takes the position that because all of the Navy-Marine Corps Court's judges have been appointed by the President and confirmed by the Senate as military officers, the Appointments Clause is satisfied. Brief in

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[1] In one additional case, the Coast Guard Court of Military Review noted the issue, but declined to rule on it. *United States v. Claxton*, 34 M.J. 1112, 1113 (C.G.C.M.R. 1992).

Opposition at 4-9. This argument misses the whole point of the Appointments Clause. While the appellate judges in this case were appointed by the President *as military officers*, they were not appointed *as judges*. The Navy-Marine Corps Court's judges exercise their power because they are judges, not because they are military officers. For example, of the approximately 90,000 officers in the Navy and Marine Corps, only the nine members of the Court of Military Review can issue extraordinary writs. *See United States v. Dettinger*, 7 M.J. 216, 218-20 (C.M.A. 1978). The *independent* judicial authority which these judges possess is quite different from the structured, accountable authority which other military officers exercise.

Furthermore, experience belies any notion that promotion to a certain military rank satisfies the Appointments Clause. When Senators vote to confirm the promotion of Marine Corps officers to the grade of Colonel, *they are not even told* which officers are judge advocates, much less whether any particular officer has been designated for future service on the Court of Military Review. *See generally* 10 U.S.C. § 624(a)(1) (1988); *see, e.g.*, 138 Cong. Rec. S204 (daily ed. Jan. 3, 1992). Neither the President nor the Senate has any part in appointing particular military officers or civilians *to the office* of Court of Military Review judge. The individual who actually makes the appointment to that office is the Judge Advocate General, a constitutionally impermissible authority.

Respondent attempts to find support in *Shoemaker v. United States*, 147 U.S. 282 (1893). Brief in Opposition at 7-9. *Shoemaker*, however, is inapposite. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of*

Thrift Supervision, 732 F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military appellate judges are appointed because Congress did not provide that service as a judge is an additional duty of some other *office*. A Court of Military Review judgeship is not an appurtenance of another position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, Court of Military Review judges do not serve *ex officio*. Thus, *Shoemaker* provides no support for Respondent.

CONCLUSION

Because the petition presents an unresolved constitutional question which affects every case decided by the four Courts of Military Review, this Honorable Court should issue a writ of certiorari.

Respectfully submitted,

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